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ABSTRACT

Staggered by some recent libel verdicts, many journalists are neglecting lessons about press freedom learned at great cost during the seventeenth and eighteenth centuries. Journalists then learned that state power over the press, residing in the hands of either censors or judges, leads to a decrease in press freedom. In 1986, though, many media lawyers and journalists hailed the Supreme Court's Anderson v. Liberty Lobby verdict, which created a situation in which 90% of libel cases may be thrown out of court by judges before they ever reach a jury. The lesson from history, for those who wish to increase press freedom, points to the folly of relying on temporarily friendly judges. Instead it is necessary to study the high regard juries tended to have for the press, see how that regard was earned, and then use that knowledge to improve current journalistic practice and current popular regard for journalistic freedom. Juries carry with them a risk of runaway populism, but that risk must be taken if judicial imperialism is to be avoided. (Fifty-two notes are included.) (Author/MS)

THE HISTORICAL IMPORTANCE OF JURY TO PRESS FREEDOM

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THE HISTORICAL IMPORTANCE OF JURY TO PRESS FREEDOM

On the question of innocence or guilt in libel cases, a recent history of defamation stated that "The determination is made, of course, by the jury."[1] Increasingly, though, there is no "of course" about it. A 1986 Supreme Court ruling hailed by many media lawyers and journalists, Anderson v. Liberty Lobby, created a situation in which it is estimated that 90% of libel cases will be thrown out of court by judges before they ever reach a jury.[2] Given the massive, press-threatening awards proposed by some recent juries, the decision might indeed seem cause for celebration. This article's examination of the importance of juries in journalism history may give us pause, though.

Recent anti-jury sentiment

The background to the Supreme Court ruling in Anderson was both attitudinal and experiential. During the first six decades of this century juries were generally treated with reverence in histories of libel law. Leonard Levy, though, led the way for a new generation of anti-jury writers by complaining (in his 1960 book, Legacy of Suppression) that "A jury is a court of public opinion, often synonymous with public prejudice..."[3] In the 1970s, many journalists applauded as judges became more active in issuing summary judgments dismissing libel complaints. There was concern, though, when Chief Justice Burger, in a famous footnote

to Hutchinson v. Proxmire (1979), suggested that summary judgments had a place only in truly open-and-shut cases, less the jury's role be eroded.[4]

In the 1980s, criticism of juries by journalists and defenders of journalists became particularly pointed. Anthony Lewis suggested that juries have little sympathy for freedom of the press.[5] Henry Kaufman, general counsel of the Libel Defense Resource Center, said, "When a libel case gets to a jury, the First Amendment kind of drops to the wayside."[6] University of Illinois professor Thomas Littlewood said, "Rarest of all in many sections of the country is the juror who has even the vaguest appreciation of what the First Amendment is."[7]

The anti-jury sentiment could point to many specific examples of juries "manifesting general community resentment by imposing liability when given the opportunity."[8] In Dallas, for instance, a $2 million jury verdict was overturned on appeal; according to the judges, the verdict resulted from animosity toward the press rather than the specific facts of the case.[9] Many such verdicts were thrown out by judges, but only after millions of dollars of lawyers' time and thousands of hours of journalists' depositions.[10]

Those who were historically-minded asked, "Why can't today's juries be like Zenger's?" They were referring to the famous 1735 trial of John Peter Zenger for criticism of New York's royal governor. During that fondly remembered episode of journalism history, the judges in their red robes and white wigs were ready to impose stiff penalties, and juries had little authority. But defense attorney Andrew Hamilton turned directly to the jurors

and asked them to find Zenger innocent, since he had published the truth. The jury retired and returned quickly with a verdict of "not guilty," after which there were "huzzas in the hall." The angered Chief Justice threatened to put those cheering in jail. In the face of overwhelming popular support for an independent press, though, he could not safely set aside the verdict.[11] Zenger was freed.

Some may choose to believe that journalists today are modern-day Zengers let down by the public. This article, though, suggests that many jury reactions for 300 years have been based on the belief that truth is a solid defense but falsehood should be punished. It's the legal situation that has changed, first in the press' favor, and more recently in the press' favor to such an extreme that a backlash has developed.

Truth and Jury: Early Doctrines and Cases

In both England and its American colonies during most of the seventeenth and eighteenth centuries, newspapers legally were supposed to serve as public relations vehicles for government, with the goal of creating warm feelings toward state authorities. For instance, British Chief Justice Holt argued that, since "it is very necessary for all government that the people should have a good opinion of it," it would be wrong "to say that corrupt officials are appointed to administer affairs." Holt's legal concern was not truth or even factual accuracy, but maintenance of the status quo: "If people should not be called to account for possessing the people with an ill opinion of the government,

no government can subsist."[12]

Holt and his brethren even developed the doctrine that has come down to us as "the greater the truth, the greater the libel." Since something that is true is likely to do more damage to a person's reputation than something considered fantastic, judges saw a writer's claim to truth as no defense, and even increased offense. As J. F. Stephens explained in his definitive 1883 work, History of Criminal Law in England, "If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good... it must necessarily follow that it is wrong to censure him openly...whether mistaken or not, no censure should be case upon him likely or designed to diminish his authority."[13]

Common people were supposed to sit still before governmental officials, minding their manners. The Court of the Star Chamber, beginning in 1542, was given the right to try without a jury those who published opinions considered seditious. It punished, among others, Dr. Alexander Leighton, a Scotsman, who declared early in the 1600s that both king and Anglican state-church had to obey biblical law. The Star Chamber had both of Leighton's ears cut off, his nose slit, and his face branded. In 1637 the Star Chamber cut off the ears of John Bastwick, Henry Burton and William Prynne, three Puritans who also placed God first, king second. Later, John Twyn was hanged for writing that the king is accountable to the people under God.[14]

The bravery of men such as Leighton, Bastwick, Burton, Prynne, and Twyn showed that, even as the law was hardening, opposition to such arbitrary state power was developing. Their

views arose out of the Reformational belief that the Bible contained laws superior to the state or to any other human institution. The medieval Catholic Church had presented itself as a divine-human bond of heaven and earth, the kingdom of God on earth. Within such a structure, obedience to leaders was mandatory. Reformers such as Calvin and Knox, though, had denied that the Kingdom of God could be equated with state or church-state. Instead, the goal of journalists and others would be the proclamation of truth regardless of what kings and officials might say.[15]

This belief made possible the development of a journalism that went beyond state public relations. Over time, there would be many different definitions of "truth," but, increasingly, those who at least had their facts straight would gain the opportunity to expound their vision. John Milton, poet and Puritan leader, wrote in 1642 that truth and falsehood should be allowed to grapple in a freer press, for "who ever knew truth put to the worse in a free and open encounter?"[16] The Puritans, and Milton himself, were not always consistent, and in any case the Puritan revolution ended in defeat in 1660, with the English monarchy restored. But the idea was on the record: Truth and falsehood should be allowed to fight each other openly.

This was a startling view, especially in an age when many governments yearned for unlimited power. In France, under Louis XIV, printers and writers were branded, imprisoned, strangled, burned at the stake, or given life sentences in the galleys. In Venice, Italy, in 1650, Ferrante Pallavicino was executed for

"disrespectful remarks." England did have a Parliament, but that did not make British political theory all that different from its neighbors: Even when the king lost power to Parliament, it was in the interest not of checks and balances but a new locus of supreme authority. As the famous jurist Blackstone wrote, "The power and jurisdiction of parliament" is "transcendant and absolute..sovereign and uncontrollable." (English lawyers put it this way: "Parliament can do everything except make a woman a man, or a man a woman.")[17]

In such a system, journalists had to fight for even the smallest bit of elbow room -- and fight they did, with popular support. Juries primarily concerned with the ethics of truth rather than the law of libel sometimes ignored judges' instructions. As early as 1692, when William Bradford was tried for seditious libel, he was insisting that the jury should decide not only whether he had printed the publication considered offensive, but also whether it was seditious; the jury, against the judge's instructions, debated both questions and ended up deadlocked.[18] Again, when William Maule was tried in 1696 in a Massachusetts court for publishing a book said to contain "wicked Lyes and Slanders...upon Government," the presiding judge asked the jury to return a verdict of guilty; a runaway jury, though, returned a verdict of not guilty.[19]

More runaway juries appear in the early eighteenth century records in both England and America. For instance, in 1707 two Presbyterian ministers of New York, Francis Makemie and John Hampton, were arrested for sedition, but the jury returned a verdict of not guilty.[20] The famous Zenger trial in 1735 also

was a battle between state power and faith in truth- telling. Attorney Andrew Hamilton emphasized, in his noted speech to the jury, "The cause of liberty...the liberty both of exposing and opposing arbitrary power by speaking and writing Truth." Hamilton argued that "Truth ought to govern the whole Affair of Libels."[21] The jury sided with Hamilton and Zenger, even though the law said otherwise.

While there were some eighteenth century miscarriages of justice in seditious libel cases, journalists who were able to demonstrate that their articles had been factual generally did well before juries. For instance, Thomas Fleet, publisher of the Boston Evening Post, was prosecuted in 1742 for "libelous Reflection upon his Majesty's Administration" that could "inflame the minds of his Majesty's subjects here and disaffect them to his Government."[22] Fleet produced witnesses who attested to the truth of his news item, and the prosecution was dropped. Also in the 1740s, William Parks of the Virginia Gazette was acquitted when he proved in court that the legislator he had criticized as a sheep-stealer actually had been convicted of that.[23]

Throughout the second half of the eighteenth century particularly, jury revolts were well publicized. In 1752, Chief Justice Lee told a London jury that bookseller William Owen was guilty, but the jury brought in a verdict of not guilty.[24] In 1770, during what became known as the Junius trials, Lord Chief Justice Mansfield told juries that they must find guilt if the defendants had published the piece said to be libelous. The defendants acknowledged that they had, but the jury still ignored

the judge and declared the defendants not guilty.[25] The issue for the jury, once again, was truth: When editors were able to show that their statements, though sharply critical, had a factual base, they often went free.

Transcripts of the trials themselves readily show the political beliefs of prosecution and defense. In the Owen trial, Attorney General Dudley Rider berated those who spoke of a right to appeal judicial decisions to juries: "An Appeal! To whom? To a mob? Must justice be appealed? To whom? To injustice?" Solicitor-general Murray defined the legal situation: "The question is, whether the jury are satisfied that the defendant Owen published the pamphlet. The rest follows of course. If the fact is proved, the libel proves itself, sedition, disturbance, &c."[26]

Defense counsel Ford, however, responded by speaking directly to the jury -- a jury made up of three merchants, three grocers, three linen-drapers, one baker, one hosier, and one oilman.[27] Ford called the prosecution's emphasis on judicial power "a doctrine that may be full of the most fatal consequences to all sorts of men." Ford asked, "If legal courts do wrong, must our mouths be shut, and not complain or petition for redress? God forbid!" He then told the jury, "I understand not the shutting of men's mouths. Let every man clap his hand upon his heart and examine how he would like it, was it his own case... Surely, gentlemen, your own breasts, your own consciences, must tell you, when you consider of it -- and pray consider it as your own case, fancy each of yourselves here under a rigorous prosecution, like this poor man, -- there is no crime

proved..."[28]

According to Chief Justice Lee, there was crime: He instructed the jury "to find the defendant guilty; for he thought the fact of publication was fully proved; and if so, they could not avoid bringing in the defendant guilty." The jury, though, returned after two hours with a verdict of "Not Guilty." Lee then asked a leading question: "Gentlemen of the Jury, do you think the evidence laid before you, of Owen's publishing the book by selling it, is not sufficient to convince you that the said Owen did sell this book?"[29]

Here the jurors were in a fix: According to one commentator, "The Jury could not say, to the question, that the evidence of publishing was not clear, without perjury; and if the jury had answered Yes, and not found the defendant guilty, one does not know what might have been done to the jury."[30] When the judge demanded an answer, "the foreman appeared a good deal flustered," but he did not answer: He merely kept repeating, "Not guilty, not guilty." Several other jurymen chimed in: "That is our verdict, my lord, and we abide by it." The attorney general wanted to ask more questions, but the crowd was cheering and the noise did not permit more dialogue; the judge gave up.[31]

Similarly, in the 1770 case of Rex v. Miller, Solicitor General Thurlow argued for the prosecution that the case was "so plain, and in so ordinary a course of justice, that it would absolutely be impossible to have mistaken, either the application of the proofs of the charges that are laid or the conclusion to be made from them."[32] But defense counsel Davenport,

exaggerating somewhat, told the jury to "consider the nature of this question that comes before you, and the full and the absolute power which you have over it; for no power in this kingdom has the least control over you." Davenport asked jurors to go beyond examination of the fact of printing: "It is for you, and you only, to determine whether this paper deserves all the branding epithets with which it is loaded."[33]

Near the end of the trial, Chief Justice Mansfield said with apparent resignation, "I am used to speeches made to juries, to captivate them, and carry them away from the point of enquiry."[34] Nevertheless, he emphasized the legal point: The jurors were to concentrate on the question of publication. As it turned out, the jurors spent over seven hours discussing the supposedly open-and-shut case, then carried their verdict o Mansfield at his house in Bloomsbury Square: "His lordship met them at his parlour door, in the passage, and the foreman having pronounced their verdict, Not Guilty, his lordship went away without saying a word." Hundreds of people who had assembled outside, though, "testified their joy, by the loudest huzzas."[35]

What appears most salient throughout this history is the tendency of jurors to make the law fit their belief that government was not a private preserve for rulers. Jurors often reacted harshly when confronted by arrogant demands for punishment of seditious libel, such as those coming from Chief Justice Hutchinson of Massachusetts in 1767 and thereafter. An English lawyer with the pen name Candor asked in 1764, "what business have private men to write or to speak about public matters? Such kind of liberty leads to all sorts of license and

obloquy."[36] But juries generally sided with the press against such elitist attitudes, and the press, consequently, worked to extend jury power and restrict that of judges.

Jurors, when they saw the press threatened by state power, even took direct action at times. When William Bradford had been on trial in 1689, he may have been saved by a juror who "accidentally" shoved with his cane the bottom of the typeform that Bradford had used to print the tract in question; when it collapsed and all the type spilled onto the floor, the evidence that Bradford had done the printing was gone.[37] Similarly, when Henry Woodfall was tried for seditious libel in 1770, he escaped renewed prosecution when a juror walked off with the prosecutor's only copy of Woodfall's newspaper.[38]

Eventually, the law was changed to conform to faith in the fairness of juries and the power of truth. In England, Fox's Libel Act of 1792 proclaimed truth as a defense and provided that the jury rather than the judge would rule on whether published material was seditious. In the United States in 1791, passage of the first amendment meant that newspapers would be free (except in extreme situations such as wartime) to publish what they chose without prior restraint; passage of the sixth and seventh amendments emphasized jury trials. The New York legislature in 1805 spelled out its understanding that truth was a defense against libel, and other states followed.

One of the most ringing court decisions concerned the opportunity for juries to determine the central issue of truth and falsehood came in the Massachusetts supreme court's

Commonwealth v. Clap (1808). The court stated that juries should find non-libelous publication of truths concerning the fitness and qualifications of a candidate for public office: "For it would be unreasonable to conclude that the publication of truths, which it is the interest of the people to know, should be an offense against their laws."[39]

The court also added sternly, though, that "For the same reason, the publication of falsehood and calumny against public officers, or candidates for public offices, is an offense most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens, to their great injury, and it may be to the loss of their liberties."[40] That court statement succinctly described the understanding of press freedom that prevailed throughout the nineteenth and early twentieth centuries: Truth (except in rare and grievous circumstances, such as wartime) was a defense against prosecution, but falsehood was no defense.

Changing sides

Libel law continued to gyrate modestly during the nineteenth and early twentieth centuries, as state courts experimented with different standards of fault and criminal libel cases became infrequent. No major departure from the pattern established early in the nineteenth century occurred, though, until 1964. That is when the Supreme Court's ruling in New York Times v. Sullivan moved away from the truth standard of past centuries by excusing reportorial falsehood concerning public officials (later, public figures also) whenever it was produced in good

conscience.[41]

To convict in such cases, according to Justice William Brennan's Sullivan opinion, juries would have to find "actual malice," defined not as demonstrable ill-will toward the subject of an article, but a journalist's subjective knowledge of falsity prior to publication.[42] Proving actual malice would be very difficult, unless a journalist had openly indicated his intent to defame. Observers such as Alexander Meiklejohn expected a new era of journalistic freedom to commence.

Meiklejohn and many other court-watchers miscalculated, just as colonial officials had miscalculated during the trials of Zenger and others. During the years since Times v. Sullivan, defamed public officials or public figures have continued to appeal to jurors, despite the legal roadblocks. Often they have found that the Holmes-Brandeis dictum from the 1920s still holds: Juries will tend to find whatever they have to find in order to punish a publication they think deserves punishment. Jurors often understand that malice as the term is now defined legally was not present, but jury reactions indicate that they do not like the idea that a writer or editor can get away with character murder.[43]

Brennan's goal, shared by a majority of his brethren, was to allow some falsity in order to gain the greatest amount of truth. Law professor Frederick Schauer has called that idea "the strategic sacrifice of some deserving plaintiffs to the more important, at least to society as a whole, goals of the first amendment."[44] But jurors have indicated repeatedly that they do

not want one man to be defamed for the supposed good of the people, just as two and three centuries ago they did not want one printer to be jailed for the supposed good of the people.

Jurors, for example, did not want Leonard Damron to be sacrificed. The Ocala Star-Banner Co. had falsely reported that Leonard Damron, a small city mayor and candidate for tax assessor, was indicted for perjury in a local court. Damron lost the election and convincingly showed harm to his business. A jury found libel. The Supreme Court let the newspaper off with no penalty at all, since the defamatory article related to qualifications of a public official and candidate for public office, and malice could not be proven.[45]

Jurors also did not want Alonzo Lawrence and James Simpson to be sacrificed. These two senior citizens were in 1974 volunteer president and secretary-treasurer, respectively, of the Rahway (New Jersey) Taxpayers Association. Rahway municipal authorities wanted to build a new firehouse, but Lawrence and Simpson led a successful campaign to get over 5,000 signatures on petitions requesting a referendum on appropriations for the firehouse. It turned out that some of the signatures were illegitimate for reasons such as a husband signing for his wife or vice versa. Typically, during petition drives, many signatures are thrown out for such reasons. But this time, an inexperienced reporter on the Rahway News-Record thought she had a scoop, and the following headline resulted: "Forgery charges may loom for Lawrence, Simpson."[46]

A New Jersey jury found that headline and the accompanying story libelous. The New Jersey Supreme Court, though, following

Sullivan and its progeny, decided that both Lawrence and Simpson were public figures who would have to prove actual malice.[47] They gave up, knowing they could not do that. New Jersey Supreme Court Justice J. Schreiber filed a dissenting opinion. He argued that, because of the majority's decision, "Two highly motivated senior citizens are left without redress for libelous publications holding them up to contempt and ridicule in the community in which they have lived for many years. This is the result of their sincere attempt to participate in local government."[48]

The juries in these and many similar cases sided with the plaintiffs, and big dollar verdicts (almost always overturned or decreased substantially) began to emerge. So in 1986, when the Supreme Court in Anderson v. Liberty Lobby ruled 6-3 that judges should have more power to dismiss (without benefit of jury trial) most libel charges against the press, many journalists were jubilant. The majority opinion, written by Justice Byron White, declared that libel suits filed by public officials and public figures in Federal courts must be dismissed before trial unless the evidence suggests plaintiffs can prove libel with "convincing clarity."[49]

The implications of the opinion were clear. In three consecutive sentences White's language emphasized the ways in which a judge could reduce the opportunity for runaway juries: "The judge must ask himself... whether a fair-minded jury could return a verdict for the plaintiff... there must be evidence on which the jury could reasonably find for the plaintiff.... [The

judge] unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict..."[50]

Ironically, Justice Brennan was in dissent this time, complaining that the Court majority's decision could "erode the constitutionally enshrined role of the jury." Brennan argued the decision would be seen as "an invitation -- if not an instruction -- to trial courts to assess and weigh evidence much as a juror would."[51]

Nor did it seem that the decision necessarily would lead to speedier trials. As then-U.S. Court of Appeals Judge Antonin Scalia noted, under the new standards "disposing of a summary judgment motion would rarely be the relatively quick process it is supposed to be," since the plaintiff would now have to "try his entire case in pretrial affidavits and depositions";[52] the defendant would also want to use all of his ammunition in response. The real difference would not be time and expense, but the movement of the trial from open court with jury to judge's chambers.

Such a movement might appear beneficial in the short run, but it could over time establish precedents that could condemn us to repeat the sad history of seventeenth and eighteenth century judicial arrogance. To avoid such a danger, journalists and others need to remember and reemphasize the importance of jury to press freedom.

Notes

1 Thomas L. Tedford, Freedom of Speech in the United States (New York: Random House, 1985), p. 113.

2 Anderson v. Liberty Lobby, 12 Med. L. Rptr. 1977.

3 Leonard Levy, Legacy of Suppression (Cambridge: Harvard University Press, 1960), p. 197. Levy has remained consistent on this point; see his Emergence of a Free Press (New York: Oxford, 1985).

4 Hutchinson v. Proxmire, 443 U.S. 111 (1979).

5 Anthony Lewis, "New York Times v. Sullivan Reconsidered: Time to Return to 'The Central Meaning of the First Amendment,'" 83 Columbia Law Review 603 (1983).

6 Quoted in Rodney Smolla, Suing the Press (New York: Oxford University Press, 1986), p. 13.

7 Gannett Center for Media Studies, The Cost of Libel (New York: Gannett, 1986), p. 12.

8 Marc Franklin, "Good Names and Bad Law: A Critique of Libel Law and a Proposal," 18 USFL Rev. 10 (1983)

9 James Goodale, "Survey of Recent Media Verdicts, Their Disposition on Appeal, and Media Defense Costs," in Media Insurance and Risk Management 1985 (New York: Practicing Law Institute, 1985), p. 69. Also see Herbert v. Lando, 441 U.S. 153 (1979).

10 See Marvin Olasky, "The Cost of Libel," World, April 12, 1986, p. 12.

11 James Alexander, ed., A brief Narrative of the Case and Tryal of John Peter Zenger, Printer of the New-York Weekly Journal, second edition, Stanley Nider Katz, ed. (Cambridge: Harvard University Press, 1972), p. 101. See also Livingston Rutherford, John Peter Zenger (New York: Dodd, Mead, 1904, and David Paul Nord, "The Authority of Truth: Religion and the John Peter Zenger Case," Journalism Quarterly, Summer, 1985, p. 227.

12 Rex v. Tutchin, in Thomas Bayly Howell, comp., A Complete Collection of [British] State Trials to 1783. Continued by T.J. Howell to 1820 (London, 1816-1828), volume 14, p. 1095.

13 J. F. Stephens, History of Criminal Law in England (London, 1883), volume 2, p. 299.

14 For descriptions of these and other cases, see Frederick Siebert, Freedom of the Press in England 1476-1776 (Urbana: University of Illinois Press, 1952).

15 For an example of this application of the thought of Calvin and Knox, see Samuel Rutherford, Lex Rex (Harrisonburg, Va.: Sprinkle Publications, 1982). Originally published in 1644.

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17 See Marvin Olasky, "Independence Day for a Free Press," The Constitution, November, 1985, p. 20.

18 Isaiah Thomas, The History of Printing in America (Worcester: Isaiah Thomas, Jr., 1810), volume 2, p. 12.

19 Matt Bushnell Jones, Thomas Maule, The Salem Quaker and Free Speech in Massachusetts Bay (Salem: The Essex Institute, 1936), p. 30.

20 A Narrative of a New and Unusual American Imprisonment of Two Presbyterian Ministers: And Prosecution of Mr. Francis Makemie, 1707, by a Learner of Law, and Lover of Liberty. Reprinted in Peter Force, ed., Tracts and Other Papers Relating Principally to the Origin ..of the Colonies in North America (New York: P. Smith, 1947 ed.), volume 4, no. 4, p. 24.

21 Alexander, p. 99.

22 Thomas, 2:234, 473. See also Clyde Augustus Duniway, The Development of Freedom of the Press in Massachusetts (New York: Longmans, Green, 1906), pp. 112-115.

23 Thomas 2:143-144.

24 Rex v. Owen, in Howell, volume 18, p. 1203.

25 Rex v. Miller, in Howell, volume 20, p. 870.

26 Rex v. Owen, op. cit.

27 Ibid.

28 Ibid.

29 Ibid.

30 Ibid.

31 Ibid.

32 Rex v. Miller, op. cit.

33 Ibid.

34 Ibid.

35 Ibid.

36 A Letter from Candor to the Public Advertiser (London, 1764).

37 Thomas, volume 2, p. 12.

38 Howell, volume 20, pp. 895, 917.

39 Commonwealth v. Clap, 4 Tyng 183.

40 Ibid.

41 New York Times v. Sullivan, 386 U.S. 254. See also James Goodale, "Centuries of Libel Erased by Times-Sullivan," 191 NYLJ 49 (1984)

42 Ibid.

43 For example, see Tavoulareas v. Washington Post, 567 F. Supp. 651 (1983) and 759 F.2d. 90 (1985). Also see Gannett Center's The Cost of Libel; Randall Bezanson, Gilbert Cranberg, John Soloski, "Libel and the Press: Setting the Record Straight," The 1985 Silha Lecture, University of Minnesota, May 15, 1985;, and Congressional Record, July 24, 1985, E3478.

44 Frederick Schauer, "Public Figures," 25 William and Mary Law Review, (1984), 905, 910.

45 Ocala Star-Banner Co. v. Damron, 401 U.S. 285 (1971).

46 Lawrence v. Bauer Pub., 89 N.J. 451, 446 A. 2d 469 (1982).

47 Ibid.

48 Ibid.

49 Anderson v. Liberty Lobby, 12 Med. L. Rptr. 1977.

50 Ibid.

51. Ibid.

52. 11 Med. L. Rptr. 1005.

Abstract

THE HISTORICAL IMPORTANCE OF JURY TO PRESS FREEDOM

Staggered by some recent libel verdicts, many journalists are neglecting lessons about press freedom learned at great cost during the seventeenth and eighteenth centuries. Journalists then learned that state power over the press, residing in the hands of either censors or judges, leads to a decrease in press freedom. Last year, though, many media lawyers and journalists hailed the Supreme Court's Anderson v. Liberty Lobby verdict, which created a situation in which 90% of libel cases may be thrown out of court by judges before they ever reach a jury.

The lesson from history, for those who wish to increase press freedom, points to the folly of relying on temporarily-friendly judges. Instead, we should study the high regard juries tended to have for the press, see how that regard was earned, and then use that knowledge to improve current journalistic practice and current popular regard for journalistic freedom. Juries carry with them a risk of runaway populism, but that risk must be taken if judicial imperialism is to be avoided.